BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LARRY J. WYRICK	)	
Claimant	)	
	)	
VS.	)	
	)	
BINGHAM TRANSPORTATION, INC.	)	
Respondent	)	Docket No. 1,052,230
	)	
AND	)	
	)	
BERKSHIRE HATHAWAY	)	
HOMESTATE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

This matter is before the Board on remand from the Kansas Court of Appeals from its February 20, 2015, Memorandum Opinion. This case has been placed on the summary docket for disposition without oral argument.

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Michael P. Bandrè of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations as set forth in its original Order of January 16, 2014, together with the February 20, 2015, Memorandum Opinion of the Kansas Court of Appeals.

ISSUES

The Kansas Court of Appeals concluded respondent is not entitled to a reduction in the award and declared all other issues on appeal moot. The Court of Appeals vacated the Board's prior Order and remanded the case for further proceedings consistent with its opinion.

Claimant argues he is entitled to an award of compensation for permanent total disability benefits totaling $125,000.00, commencing December 8, 2009, and continuing until paid in full.

Respondent did not file a brief in this matter.

FINDINGS OF FACT

The Board adopts the factual and procedural overview set forth by the Court of Appeals and the Board's findings of fact as written in the Board's Order of January 16, 2014. This matter was originally before the Board on claimant's appeal of the August 26, 2013, Award of Administrative Law Judge (ALJ) John D. Clark. In its Order of January 16, 2014, the Board modified the ALJ's award and granted a 31 percent credit to respondent for claimant's previous workers compensation injuries and impairment based upon K.S.A. 2009 Supp. 44-501(c).

The Court of Appeals wrote:

> K.S.A. 44-510a is more specific than K.S.A. 2009 Supp. 44-501(c) and limits the reduction for when the prior disability award extends past the date of the later injury, which did not occur in this case. Therefore, although K.S.A. 2009 Supp. 44-501(c) and K.S.A. 44-510a state Bingham could be entitled to a reduction because Wyrick's 2009 injury aggravated his two prior injuries and those two prior injuries resulted in workers compensation awards, any reduction is limited to only situations where the prior awards overlap with the new award. Because of this limitation, Bingham was not entitled to a reduction in Wyrick's award.[1]

ANALYSIS AND PRINCIPLES OF LAW

The sole issue in the prior appeal and Board Order was whether respondent was entitled to a credit for claimant's previous workers compensation injuries and impairment. While the majority agrees with the dissent in this matter, the Court of Appeals has said respondent is not entitled to a credit for preexisting impairment. The original Award by ALJ Clark dated August 26, 2013, is modified to reflect a finding that respondent is not entitled to a credit for preexisting impairment.

CONCLUSION

Respondent is not entitled to a credit for preexisting impairment. Claimant is permanently and totally disabled as a result of his work-related injuries.

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[1] *Wyrick v. Bingham Transportation, Inc.*, No. 111,201, 2015 WL 802741 (Kansas Court of Appeals unpublished opinion filed Feb. 20, 2015).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated August 26, 2013, is modified to reflect no credit for claimant's preexisting impairment.

Claimant is entitled to 21.00 weeks temporary total disability compensation at the rate of $546.00 per week or $11,466.00 followed by permanent total disability compensation at the rate of $546.00 per week not to exceed $125,000.00 for a permanent total general body disability.

IT IS SO ORDERED.

Dated this _____ day of August, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

K.S.A. 44-510a was enacted in 1968. Such statute was repealed as of May 15, 2011. The version in effect for this claim stated:

> (a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall

> disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.
>
> (b) The percentage of contribution that the prior disability contributes to the later disability shall be applied to the money rate actually collected or collectible for the prior injury and the amount so determined shall be deducted from the money rate awarded for the later injury. This reduced amount of compensation shall be the total amount payable during the period of time provided in subsection (a), unless the disability award is increased under the provisions of K.S.A. 44-528 and amendments thereto.•

K.S.A. 44-510a only concerns a reduction in an award where a prior disability due to a workers compensation injury contributes to a disability following a later injury and there are overlapping payments:

> K.S.A. 44-510a specifically applies to situations in which an employee has received compensation for a prior disability. A reduction in benefits is calculated according to the statute to prevent overlapping benefits, *i.e.*, where benefits from the prior injury would otherwise continue after the later injury.[2]

K.S.A. 44-510a, as written, allows a reduction of a later award by a money rate, i.e., a weekly payment, for the prior injury, to the extent the prior disability contributes to the overall disability following the later injury and only for weeks that overlap.[3] K.S.A. 44-510a does not concern a reduction in an award based on a preexisting functional impairment and makes no reference to K.S.A. 44-501(c).

In 1993, K.S.A. 44-510a was last amended to change the word "workmen's" to "workers." That same year, the legislature enacted a new statutory provision, K.S.A. 44-501(c), which states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased

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[2] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 360, 180 P.3d 590 (2008).

[3] See *Miner v. M. Bruenger & Co.*, 17 Kan. App. 2d 185, 193, 836 P.2d 19 (1992).

> disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Unlike K.S.A. 44-510a, K.S.A. 44-501(c) mandates that an award of compensation be reduced by the amount of functional impairment determined to be preexisting.[4] The statute contains no reference to K.S.A. 44-510a, no reference to overlapping weeks of disability and no reference to a prior disability contributing to a current disability.

The undersigned Board Members dissent for two reasons: (1) due to the fact claimant never raised his argument about the supposed interrelatedness of K.S.A. 44-510a and K.S.A. 44-501(c) to the Appeals Board, the Court of Appeals should not have addressed claimant's argument, and (2) K.S.A. 44-501(c) and K.S.A. 44-510a are separate and distinct statutes that should be interpreted and applied based on plain language without unnecessary dependence on the other statute.

As for our first contention, claimant argued to the Kansas Court of Appeals that a reduction in benefits under K.S.A. 44-501(c) was somehow dependent on the need for overlapping weeks of monetary benefits, as noted in K.S.A. 44-510a. Such argument was simply never raised to either the judge or the Appeals Board. Generally, unless a statutory exception applies under K.S.A. 77-617, the Kansas Court of Appeals will not consider arguments raised for the first time on appeal. None of the statutory exceptions to such rule apply to this matter. "An appellate court will not consider an issue in a workers'-compensation appeal if it was not raised in the administrative hearing."[5] However, claimant's new argument on appeal was permitted despite his failure to exhaust administrative remedies. Claimant's *entire* argument to the Board was that K.S.A. 44-510a did not apply to reduce his award:

> The Respondent will attempt to argue that 44-510(a) [*sic*] allows a reduction in the weekly benefits paid to the Claimant. However, a careful reading of this statute reveals that the Respondent is only entitled to a reduction in compensation for prior compensable permanent injury if certain conditions are met. The Respondent has not proven the necessary conditions in this case. Specifically, 44-510(a) [*sic*] states the following[:] "the reduction shall be made only if the resulting permanent total or permanent disability was contributed to by a prior disability . . ." Thus, the Respondent must prove that any prior compensable claims contributed to the Claimant's permanent total disability. There is no such evidence in this case. The evidence in this case is uncontroverted. The Claimant had two prior back injuries which resulted in surgery. Fortunately, after both surgeries, the Claimant was

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[4] "The express language of K.S.A. 44-501(c) requires that a claimant's award of compensation be reduced by his or her percentage of preexisting functional impairment." *Ward v. Allen Cnty. Hosp.*, 50 Kan. App. 2d 280, 282, 324 P.3d 1122 (2014). "K.S.A. 44-501(c) requires an award to be reduced by the amount of preexisting functional impairment." *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 360, 180 P.3d 590 (2008).

[5] *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 264, 211 P.3d 175 (2009).

released without restrictions and without medication. The Claimant was pain free and symptom free post-surgery on both occasions. The Claimant was able to return to his regular duties with Respondent after both prior surgeries and performed those duties without accommodation. The Respondent has stipulated to the obvious fact that the Claimant is now permanently and totally disabled from performing substantial gainful employment. There is no evidence from an expert witness that established that the prior work injuries contributed at all to the Claimant's current status of being permanently totally disabled from performing substantial gainful employment. There is no evidence before the Court that any prior disability contributed to the Claimant's resulting permanent total disability status. As a result of this lack of evidence, K.S.A. 44-510(a) [*sic*] cannot be used to reduce the compensation due Claimant in this case.

Secondly, the Court fails to take into account K.S.A. 44-510a, which provides:

> If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers' [sic] compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. *Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate.* Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment. (Emphasis added.)

Thus, while Mr. Wyrick had prior workers' [*sic*] compensation claims, the amount of the settlements in those cases would have long been paid prior to this injury. The application of this statute is illustrated in *Lyons v. IPB, Inc.*, 33 Kan.App. 2d 369, 102 P.3d 1169 (2010). In that case, claimant Lyons was found to be permanently totally disabled from substantial gainful employment and received an impairment rating of 34% permanent partial impairment based on earlier injury. Mr. Lyons then went to work for the respondent and was injured in 1999. The Respondent in that case also asked for an offset pursuant to K.S.A. 44-501(c). The court determined

> that Mr. Lyons had settled his first injury claim in 1991 for $35,249.71. The Court further noted that "prior permanent partial disability award appears to have terminated by the date of the second injury in July 1999. Thus, under K.S.A. 44-510(a) [*sic*] no reduction and the [*sic*] permanent total disability would be warranted." The result should occur here. The Claimant sustained a prior injury and no reduction should be allowed as Mr. Wyrick was no longer receiving compensation for the prior disability.[6]

As is evident, claimant was arguing K.S.A. 44-510a did not effect a reduction in his benefits. What may not be evident is claimant's creation of a "straw man" – the inaccurate assertion that respondent was arguing K.S.A. 44-510a applied to the case. Respondent never made this argument. Claimant simply ignored respondent's argument that K.S.A. 44-501(c) applied, at least when arguing his case to the Appeals Board. The only passing reference claimant noted regarding K.S.A. 44-501(c) is that an employer had raised such statute to request a reduction in *Lyons*.[7] However, claimant still made absolutely no argument that K.S.A. 44-501(c) did not apply to his case unless K.S.A. 44-510a first applied, at least until he got to the Kansas Court of Appeals. It is difficult to grasp how the Board erred in failing to address an argument claimant never advanced before the Board.

Claimant's argument to the Board that there should be no reduction in his award based on K.S.A. 44-510a does not encompass the argument that a reduction is inappropriate under K.S.A. 44-501(c). The language of these statutes is different and the statutes are considered and applied in different manners. This leads to the dissenting Board Members' second contention.

K.S.A. 44-501(c) and K.S.A. 44-510a should be construed and applied based on plain language. With all due respect, the Kansas Court of Appeals did not construe or apply the statutes as written. The statutes concern deductions in an award based on wholly different criteria:

- K.S.A. 44-501(c) concerns a mandatory deduction for preexisting functional impairment (which is not an overlapping weekly dollar figure).

- K.S.A. 44-510a concerns a deduction for overlapping weekly dollar payments from a prior workers compensation disability that contributes to the current disability (which is not a deduction for a preexisting functional impairment rating).

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[6] Claimant's Brief (filed Oct. 18, 2013) at 3-4.

[7] *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 102 P.3d 1169 (2004). At oral argument, claimant never argued to the judge or the Board that K.S.A. 44-501(c) did not apply to reduce his award, other than baldly stating the statute did not apply to permanent total disability awards.

In other words, a credit under K.S.A. 44-510a is based on weekly dollars received – something tangible. A credit under K.S.A. 44-501(c) is based on preexisting functional impairment – an intangible percentage. The statutes deal with "apples and oranges." The Court of Appeals has confused the application of the two statutes.

Payne illustrates the two statutes are separate and not dependent upon each other:

> K.S.A. 44-510a applies to situations in which an employee has received compensation for a prior disability. A reduction in benefits in calculated according to the statute to prevent overlapping benefits, *i.e.*, where benefits from the prior injury would otherwise continue after the later injury. On the other hand, K.S.A. 44-501(c) requires an award to be reduced by the amount of preexisting functional impairment.[8]

In addition to *Payne* showing the different application of the statutes to different scenarios, *Lyons* did not treat K.S.A. 44-501(c) as dependent on K.S.A. 44-510a. *Lyons* noted the claimant in that case had an injury in 1999 that was separate and distinct from a prior injury in 1990, and the evidence was disputed whether the latter injury was an aggravation of the first injury, such that K.S.A. 44-501(c) did not apply. The Court separately noted K.S.A. 44-510a did not apply (even though the respondent in such case was not raising such argument) because weekly payments from the prior case appeared to have ended before the 1999 injury, such that there would not be overlapping payments. *Payne* did not state a reduction under K.S.A. 44-501(c) is unavailable unless K.S.A. 44-510a first applies.

Under the Kansas Court of Appeals' current reasoning, the starting point is K.S.A. 44-510a. If such statute does not apply, i.e., there is no contribution from the prior injury and no overlapping weekly payments, there is no reason to examine the application of K.S.A. 44-501(c). Essentially, if the *Wyrick* decision is correct, the *Lyons* Court's assessment of K.S.A. 44-501(c) separate and apart from examining the application of K.S.A. 44-510a was an exercise in futility, a complete and utter waste of time. Instead of treating the statutes as separate and distinct in application, as was the case in *Payne* and *Lyons*, the Kansas Court of Appeals confused and conflated the two statutes. Unfortunately, the mix and match of the two statutes results in the Legislature's plain meaning of K.S.A. 44-501(c) not being carried out.

The Kansas Court of Appeals is apparently stating a reduction of an award for preexisting impairment under K.S.A. 44-501(c) is only applicable if a prior disability results in overlapping weeks of permanent disability benefits that contribute to the new disability.

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[8] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, Syl. ¶ 5, 180 P.3d 590 (2008). The *Payne* methodology for applying the preexisting credit to a permanent total disability award was discredited in *Ballard v. Dondlinger & Sons Const. Co.,* No. 112,490, 2015 WL 4965903 (Kansas Court of Appeals unpublished opinion filed August 21, 2015).

It appears the Kansas Court of Appeals has taken the sentence from K.S.A. 44-501(c), "Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting," and changed it to:

> Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting *if and only if weekly payments for the preexisting functional impairment overlap with payments associated with new permanent partial or permanent total disability and the prior disability contributed to the current disability.*

However, K.S.A. 44-501(c) does not contain this added language. There is no reference in K.S.A. 44-501(c) indicating respondent only gets a credit for preexisting functional impairment if K.S.A. 44-510a first applies and there is contribution from a prior disability and overlapping weekly dollar payments. The Kansas Supreme Court is clear that statutes are to be applied as written:

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.[9]

The Court of Appeals stated K.S.A. 44-510a is a specific statute which controls over the general language of K.S.A. 44-501(c). These Board Members disagree because the two distinctly different statutes apply to two distinctly different scenarios. The former statute permits a reduction of an award based on overlapping weekly payments where the prior disability contributed to the current disability, irrespective of preexisting functional impairment. The latter statute allows a reduction where a claimant has preexisting functional impairment, irrespective of contribution or overlapping payments. The Court of Appeals is correct that K.S.A. 44-510a does not apply because there are no overlapping weekly payments. However, the inapplicability of K.S.A. 44-510a does not preclude application of K.S.A. 44-501(c). Based on the plain language of K.S.A. 44-501(c), respondent must receive a reduction in the award based on claimant's preexisting impairment.

As a final observation, K.S.A. 44-501(c) has never been applied as set forth in *Wyrick*. If *Wyrick* is correct law, many prior Kansas Court of Appeals decisions must be

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[9] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

bad law, including *Jamison*,[10] *Ballard,*[11] and *Kirker*,[12] to name just a few. In all of those cases, prior disability benefits for prior disabilities were paid out prior to a worker's new injury, but a reduction under K.S.A. 44-501(c) was appropriate, without any reference to K.S.A. 44-510a.

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BOARD MEMBER

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Ali Marchant, Administrative Law Judge

[10] *Jamison v. Sears Holding Corp.*, No. 109,670, 2014 WL 1887645 (Kansas Court of Appeals unpublished opinion filed May 9, 2014).

[11] *Ballard v. Dondlinger & Sons Const. Co.*, No. 109,905, 2014 WL 1887654 (Kansas Court of Appeals unpublished opinion filed May 9, 2014).

[12] *Kirker v. Bob Bergkamp Const. Co.*, No. 107,058, 2012 WL 4937471 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012).